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NOTICE

The volume numbering of Law Library Journal is being changed with this issue to coincide with the calendar year. Hereafter the first issue of each volume will appear in January instead of April as in the past. Volume 21, 1928, is complete in three issues, April, July and October, and a title page and contents to the volume is included in the present issue.

TWENTY-FOURTH ANNUAL CONFERENCE, WASHINGTON, D.C., MAY 13-18, 1929

Announcements

At an informal meeting of the executive committee, Friday, June 1, 1928, at French Lick Springs Hotel, it was decided to give over the greater part of the next annual conference to round table discussions. It is hoped to have round table discussions on the following subjects:

1. Problems pertaining to Bar and County Law Libraries.
2. Problems pertaining to Law School Libraries.
3. The State Law Index or the Biennial Index of State Legislation now being prepared by the Library of Congress.
   There will be a joint meeting of the National Association of State Libraries, the Special Libraries Association, and the American Association of Law Libraries probably at the Library of Congress, and it is hoped that copies of the 1925-1926 Biennial Index will be ready for distribution to members before the annual meeting.
4. Subject headings as used on the Library of Congress cards relating to law.
5. Educational requirements for librarians of law libraries and how the Graduate Library School of the University of Chicago may assist.

Full detailed announcements in regard to the annual meeting and round table discussions will be mailed to members about April 1.

The General sessions of the American Library Association will be held at the Auditorium; and registration, exhibits and general headquarters will also be there.

Further announcements will appear in the April issue of Law Library Journal.

TATE HALL, THE LAW BUILDING OF THE UNIVERSITY OF MISSOURI *

By PERCY A. HOGAN, Law Librarian

In attempting a description of a building such as Tate Hall there is always a temptation to fall back on figures, but I will try to avoid speaking in terms of feet and inches as much as possible. In order to help you visualize the building as it stands, I have prepared one or two outline plans showing the general layout of the building. It is possible that Tate Hall does not present any novel features in law library design and construction, but it may afford a basis of comparison with any plans you may perhaps have under consideration. In general, I believe that the design of the quarters which house our law libraries is pretty much standardized, and it is the details which provide the exceptions.

Tate Hall was formally opened in the fall of 1927. Its erection was made possible by the gift of $75,000 by Mr. Frank R. Tate of St. Louis in memory of his son, Lee H. Tate, a graduate of the Law School of the University of Missouri, the gift being made contingent upon the appropriation by the Missouri Legislature of a like sum. The building itself cost $150,000 and the furnishings $35,000. The lower half of the building is of limestone and the upper half mainly of red brick to harmonize with the other buildings on the campus. It extends north and south, thus insuring a maximum amount of sunlight.

The building consists of a basement, first floor containing the class rooms, and a second and mezzanine floor where the library and offices are located. The basement contains a smoking room for the students, equipped with tables, chairs and benches. The students' lockers are in the basement hall handy to the smoking room, approximately one hundred being located here and the balance on the floor above. They are equipped with the "click system" of keyless locks—a padlock with a miniature combination on its face and operated by counting the clicking sounds made by the combination rather than by figures on a numbered dial. The machinery room is placed on the east side of the building, containing among other things the ventilating plant and a central vacuum cleaner. The vacuum cleaner has, as might be expected, been a most valuable item of the equipment and is used daily for general cleaning and on the books. There is an outlet on each side of the reading room and others on each tier of stack, so that it is possible to reach every point. A switch is placed at every outlet together with a signal light, which shows red when the machinery is in operation, so that the cleaner may be operated from any point without going to the basement. A small elevator (or dumb waiter) shaft located in a passage at the end of the machinery room has landings in the librarian's office on the second floor and also on the mezzanine. This passage is all that remains of a packing or receiving room in which the elevator was to land, as shown in the original plans, it being necessary eventually to transfer the space to the machinery room. A word of advice about elevators—do not install a hand power elevator if it is to be used to any great extent or if heavy loads necessitating a large carriage are to

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* Presented at the Twenty-third Annual Meeting of the American Association of Law Libraries, at French Lick, Ind., May, 1928.

to be raised on it. The expenditure of the few hundred dollars additional for electrical equipment will prove economical in the end, I believe. The entire balance of the basement is occupied by the University Club, the University faculty organization.

The first floor contains the class rooms, the largest of which will accommodate 162 students; there are three in all with a total seating capacity of 310. The two larger rooms are situated at the extreme ends of the building. The floors are graded away from the entrance so that the students are all in view from the instructor's desk at the rear of the room. A word as to detail of equipment of the classrooms. The students' desks are individual flat top ones; however, they are placed with the ends so near to one another that the effect is that of a continuous semi-circular bench. Each desk is set on a hollow steel pedestal which is fastened to the cement floor by six bolts. The chairs are fastened in the same way. We have noticed some tendency for the bolts to loosen up in the cement. Cost of installation of this type of desk and chair must be comparatively high, since considerable labor is involved in the boring of twelve holes to each desk and chair—a total in this instance of some thirty-seven hundred—and in the lining up of the individual pieces to a uniform level. In addition to the class rooms, the first floor provides a coat room for the students, and also a court room. Sixty more lockers are placed in the first floor hall, in recesses in the wall, so that the outer faces of the lockers are flush with the walls.

The library is located on the second or top floor, the reading room occupying the south half, while the north section is taken up by the stack and offices.

It might be well at this point to describe briefly the library which the building houses, and its administration. It consists of approximately thirty thousand volumes at the present time. Student help is used and students are in charge at times when the librarian is not on duty; but one man is on duty at any one time, so that it is essentially a one-man library and its equipment must necessarily be designed to meet those conditions.

The reading room is approximately fifty-six by forty-three feet in size, and the height from floor to peak of the ceiling is thirty feet, making a well proportioned room with an abundance of air space. Natural light is available on three sides, there being five windows each six by sixteen feet on each side, and three more in the south end; they are of the casement type and may of course be opened in case additional ventilation is required. We have used Venetian blinds on the windows and have found them very satisfactory; they are adjustable, and the amount of light and air admitted may be easily regulated. Artificial lighting is provided by six large pendants in the reading room and eight others over the mezzanine and bridge, direct reading light being furnished by three double lamp standards on each table.

The room is equipped with ten tables, each fourteen by four feet and each accomodating twelve readers or a total of one hundred and twenty in the main reading room. The tables, chairs and book cases are all finished in walnut. Built-in book cases are on three sides of the reading room and a portion of the fourth side; the height of these is regulated by the windows and a four-shelf case is the result. This gives a wall shelf capacity of about three thousand

volumes—approximately ten per cent of the total—and enough to accommodate the local reports, statutes and digest, the National Reporter System, United States Supreme Court Reports, encyclopedias and reference books. Radiators are placed behind these wall cases and are concealed by them.

The bridge forming the third side of the mezzanine, together with the other two sides, form a well. The stack is placed in this well in a space fifty-six by eighteen and a half feet, and between the two rows of offices which open onto the stack. The stack itself is the standard eight-shelf type manufactured by the Art Metal Company and is placed lengthwise with the building. The capacity of the first floor is eleven thousand five hundred volumes, of which sixty-seven hundred are included in a reserved book section. Provision has been made for reserved books by installing sectional grating or grill running lengthwise with the stack and enclosing all but the outer face of it. This grating does not extend the entire length of the shelving, but stops six feet (two sections) from the end. This enclosed space provides for approximately four thousand text books and three thousand periodicals, bar association reports and legal miscellany. Entrance is by means of four doors in the grating, two in front at the delivery desk and one on each side midway. These doors are fitted with Corbin locks and each faculty member is provided with a master key. Wall stacks outside of the reserved book space accommodate three thousand additional volumes. The delivery desk is at the south end of the stack facing the reading room.

The librarian's office is opposite the delivery desk; it is twelve by fifteen feet in size and has wall shelves for six hundred volumes.

The floor of the second tier of stack, or roof of the first tier, is of marble, and the effect of this solid floor is to enclose the first tier entirely.

On each side of the stack and opening on to it are the offices. There are nine of these including the Dean's and Secretary's, eight of them being eleven by twelve feet and the Secretary's being slightly larger. Those of the Dean and Secretary comprise a suite of three rooms, that of the Secretary opening onto the hall, while the two assigned to the Dean have access to the stack as well. Each office has built-in book cases for about three hundred volumes. The furniture, with the exception of the chairs, is of steel, desk and table tops being of composition material.

The second tier of stack is practically the same as the first and students have access to all of the books shelved there. The shelf capacity is about the same as that of the first tier, eleven thousand five hundred volumes. The space provided by the bridge and mezzanine will make it possible to add nine more reading tables seating eight people each, thus bringing the total seating capacity to one hundred and ninety-two.

The third tier of stack provides shelf space for ten thousand volumes and brings the total to forty thousand volumes.

Ventilation is supplied by a central plant located in the basement of the building, but no artificial ventilation is provided above the first, or class room, floor. The heating system used is a dual one of direct and indirect steam; the Powers Temperature Control, a thermostatic system, is used for regulation. Battleship linoleum was used as a floor covering in the offices, and cork carpet in all other parts of the building.

CIVIL LAW IN LOUISIANA*

By Miss Alice M. Magee, State Librarian of Louisiana

The title of my address was not of my own choosing, and when I was advised of it, I submitted it to the Hon. Henry P. Dart, one of our most eminent lawyers, who has spent many years in the study of the Civil Law of Louisiana, and his only comment was, that if I succeeded in covering that subject within the time usually allotted to such addresses, he would recommend me as the official adviser of the Hague Conference, or as a candidate for the Nobel Prize! I avail myself of this opportunity to thank our distinguished writer and jurist for his valuable suggestions and help in preparing this article. Much reflection on my part has settled into a conviction, that I must eliminate all that part of the subject that suggest a comparison of the law of Louisiana, with the Common and Statutory Law of the other States, for the wisdom of man has not yet reached the stage where that act can be accomplished by any one mind.

The Common Law of the original thirteen States is based upon the Common Law of England, as it stood when the latter recognized the independence of her revolted colonies. This primary law, or law of the start is now involved in each state, with an accumulation of thousands of judicial decisions, and thousands of statutes. Multiply these thousands by forty-seven States and if you are not appalled at the task you have assigned to me, then I can only add that the American Law Institute at Philadelphia has been studying the same problem for four years, assisted by expert doctors of law and it is not yet ready to restate that law. For similar reasons, the remainder of my title must resolve itself into a very general statement of the facts surrounding the origin of the Civil Code of Louisiana, and an equally general statement of the present condition of her law.

Louisiana was founded by France in 1699, and by an Edict of the King, she was placed under the dominion of the law of the Custom of Paris, and the ordinances, and laws of the Kings of France, who at that era, were the sole lawmakers of the Mother Country. The Custom of Paris had been codified in the 16th Century, and the laws and ordinances of the Kings had been printed and studied by rulers and judges and lawyers of that country for more than two hundred years before Louisiana was founded. During and after that period, rules governing procedure in the courts, both civil and criminal, were codified. The same was true of the laws of commerce and other matters that pertain to the life of the people.

All French law of that period was based upon two systems, namely, the Roman law as codified by the Emperor Justinian, and the local law of the several territorial sub-divisions of France called Customary Law, represented by the codified Customs of those sub-divisions. Between or out of the two systems, there had evolved the Civil Law of France which had a family resemblance to the ancient Roman Law and to the Customary Law, but which like the Common Law of today, was in reality an evolution in which the necessities and changing

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* Presented at the Twenty-third Annual Meeting of the American Association of Law Libraries, at French Lick, Ind., May, 1928.

conditions of France had reacted on the old laws, and altered, changed, or modified these sources so that up to the time Louisiana passed out of the control of France in 1769, it was legally and actually true to say that the Common Law of Louisiana, under French Domination from 1699 to 1769, was not the Roman Law or the Custom of Paris, but a mixture of both, called the Civil Law of France.

In 1769, Louisiana passed under the control of Spain, and that country put into operation in the Colony her own civil and criminal laws, and enforced the same until 1803, when France recovered the colony for twenty days as trustee to deliver the same to the United States, under the Treaty of 1803 between Napoleon and Jefferson, known as the Cession of 1803. At the time Spain took possession of Louisiana, her legal system had reached a condition very similar to that of France, that is to say, Spain began as France did with Customs which were the local laws of the people and she added to these the Roman Law when she was conquered by Rome. In the course of time, the Roman rule was overturned by the Vandals, the Goths, and Visigoths, and these in turn were driven out, and for centuries the Arabs, or Moors of African origin ruled over a large part of the Kingdom. Their laws were mingled with those of the conquered people. Finally, and shortly before America was discovered, the people of Spain recovered their country and under the Catholic Kings began to create new laws for the government of the country. These laws were a mixture of Roman, Customary, Moorish, Gothic, and Feudal Laws, and of original legislation by the Kings. Compilations were made from time to time and when Spain took possession of Louisiana, many codifications of those laws were in operation. The principal Codes that governed Spain and were made applicable to Louisiana were the Recopilacion, a digest of the Spanish Law, the Partidas, a similar digest, and the Recopilacion des Indies, a compilation of all the laws created for the government and management of the American colonies of Spain. To all this, there was added special laws prescribed for Louisiana alone. This whole system was called during our Spanish Colonial regime, the Civil Law of Spain and Louisiana.

The result of all this was that when the United States took possession of Louisiana in 1803, the legal situation was, in brief, that for more than one hundred years, the rights of property and person in that country had been regulated by a legal system that was classed as the Civil Law, in contradistinction from the Common Law that then prevailed in the United States. President Jefferson desired to see the Common Law introduced in Louisiana, but the very nature of things, proved the futility of this desire, and he, besides could not overcome the opposition of the people to such proposed changes. Therefore, the only immediate change made in Louisiana Law, was the introduction of the Common Law of Crimes, and the introduction of Constitutional Law. Other changes came in time. The creation of cities, towns, and counties introduced municipal law; the necessities of mercantile life introduced commercial law, so that by 1808, it could be said that the law of Louisiana was in accord with the law of the United States, and of the other States on the subjects above mentioned, but the law of the family, the law of inheritance, of wills, and like sub-

jects, were still governed by the Civil Law. In 1808, the five year contest between the partisans of the Common and the Civil Law ended in the legislative creation of a Civil Code. This was based on the projet of the Code of Napoleon adopted in France in 1804 with changes, alterations, and differences drawn from the Law of Spain and further modified by the local difference in ideas and beliefs, and above all, by the freedom of the people as citizens of a free country, a democracy, as contradistinguished from monarchy. During this period of contest, legislation had also evolved an extremely simple system of practice before the courts, and an equally simple system of criminal practice, both systems, with modifications, being still in operation in Louisiana. In 1825, the Civil Code of 1808 was revised and rewritten and this new Civil Code is called the Code of 1825, which was revised in 1870 to meet the changes in life resulting from the Civil War and this Code of 1870 is in force today, changed only by occasional legislation resulting from interpretation of the Code by the Supreme Court of Louisiana, or in acknowledgment of differences arising out of modern conditions.

Without attempting to define the law of Louisiana, and recognizing that this would necessarily be the office of those who have dedicated their lives to that subject, the subject may be summarized by saying that the differences between the law of Louisiana, and the law of the rest of the Union is not so great as it is generally supposed to be. The exception, if it is one, being that the Civil Code of Louisiana is a local statute that prescribes and regulates the rules, the method of acquiring and alienating of property, including the transmission thereof to our heirs, by effect of law or by last will and testament. Under this heading, is included the regulation of the rights which may be exercised, real property such as servitudes, and uses, and the creation of liens, privileges and mortgages affecting the same. The Civil Code also regulates the whole subject of the administration of Estates of deceased persons, and the system presents perhaps the most striking difference between the law of Louisiana, and the Common Law, only because of the simplicity, and certainty which surrounds its application. The Code also governs over family relations, such as marriage, children, husband and wife, separation, divorce and the like. The law of contract, called here the law of obligation, is also covered by the Code, and this codification of the law on that particular subject, is one of the things that Louisiana lawyers believe to be a simplification of the law of contract, that must some day be swallowed bodily in any restatement of the law of contract by the rest of the States.

Without prolonging this review of the Civil Code, it suffices to state that it is a concentration of universal principles of law, governing the civil relations of man with his fellows, and of men and women in marriage, and the results that flow from it. It protects children from the vagaries and caprices of their parents. It defines property in things, and the purposes and results of our ownership thereof.

It is, in short, an attempt to do justice, to provide an orderly and correct idea of the administration of life under law, and to carry out the precepts, or first principles of life everywhere, namely, to live honestly, to hurt no one, to give to everyone his due.

Inasmuch as these are also the underlying principles of the law everywhere, we do not see wherein the Civil Code differs from the law elsewhere, except that we can have attempted to state our law in concise shape, quickly understood, and covering in this way, the same principles that the Common Law has been slowly building up during the ages, by the wisdom of courts and legislatures.

The people of Louisiana believe that their Civil Code has carried out these precepts; they have attempted to order their lives under its direction; they believe that there is due to it the cohesion of purpose which has enabled them to meet, face, and overcome the calamities that war, pestilence and the forces of nature have from time to time imposed on them, and their lawyers believe that existence of this Code has enabled the legislatures in other States, to incorporate into their own laws, many of the ideas now prevailing here, which have tended to ameliorate, and to rectify the hardships that once afflicted the people under the ancient Common Law.

THE HISTORY OF THE ADOPTION OF THE CODES OF CALIFORNIA *

By Miss Rosamond Parma, Law Librarian, University of California, Berkeley

In presenting this paper to the American Association of Law Libraries on the "History of the Adoption of the Codes of California," it may not be amiss or improper to preface the history of the codes with a brief account of the condition of affairs in California previous to the organization of state government and with the legislative history of California during the period between the formal admission of California into the Union and the adoption of the Codes.

"California was, at first, a missionary territory. As auxiliary to the Missions, Presidios (Forts), and Pueblos (agricultural villages) were established in the neighborhood of the Missions and Presidios, with the two-fold object of providing supplies for the Presidios and of establishing colonies of Indian neophytes. In these Pueblos and Missions, converted Indians and discharged soldiers, in addition to other Pobladores, were settled. The colonies were on the out-skirts of civilization. They needed but few laws. The government was of a patriarchal character, little regard being paid to the letter of the laws, either of Spain or Mexico . . .

"Such was substantially the conditions of things in California under the Mexican rule. With the revolution, which severed Mexico from the Spanish Crown, came disorder and disorganization. The Missions were broken up, the Presidios neglected, and no new system was adopted and enforced in place of the one which had fallen into disuse." [1]

Land was of little, if any value. "This system continued until the conquest of the country,—until the discovery of gold—until the Americans thronged into northern California—a portion of the country which could be said previously to

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[1] 1 California Reports. Preface.

have contained scarcely any population except Indians. A sudden change then took place, land became valuable, towns sprang up, and to supply the population, agriculture was found to be one of the most lucrative employments."[2]

Americans took possession of great tracts of land which they found wild or vacant, notwithstanding the lands might have been part of some large ranch. Questions involving tracts of land came up for adjudication. Records and papers had been destroyed by several destructive fires in the city of San Francisco which was made up of the flimsiest structure of wood and canvas. Difficulties occurred in determining the jurisdiction and powers of judges. As a result confusion and disorder followed.

Before the organization of state government, society was in a disorganized state. Custom and tradition upheld the laws that were already in existence. Commercial transactions between Americans took place with reference to the Common Law as modified and administered in the United States and without regard to the unknown laws of the republic of Mexico, and the equally unknown customs and traditions of Californians. The Alcaldes, before and after the annexation of the country, paid only such attention to the American or Mexican Law as suited their fancy or convenience. The judges of the first instance appointed by General Riley, then military governor of California, being common law lawyers and not acquainted with the Mexican or Spanish law, except as they could gather from a small pamphlet which had been translated and published by the order of General Riley, conducted their proceedings for the most part, according to the Common Law, or the statutory regulations of the states from which they had come, and their decisions were generally based upon the Common Law.

According to Nathaniel Bennett, one of the justices of the Supreme Court in 1850, the Supreme Court was confronted with the labor of searching for "authorities in an unfamiliar language, and an unfamiliar system of Jurisprudence, of ascertaining the law, as laid down in the codes of Spain; in the royal and vice-royal ordinances and decrees; in the laws of the imperial congress of Mexico; in the acts of the republican congress; in presidential regulations; in decrees of dictators, and acts of proconsular governors." Many ordinances and decrees, claimed to have the force of law, had not been printed even in Mexico, and they, as well as all other books upon Spanish and Mexican laws, could be procured only with great difficulty and at great expense, and indeed, at first, could not be procured at all.

The formation of the state constitution which was ratified in November 1849 was the first step towards making order out of chaos. The first legislature which met in December 1849 also accomplished a great deal.

"Though theoretically the law of the conquered country remained, under well settled principles of international law, unchanged until superseded by statute; practically, the majority of the population of the new territory regarded themselves as bound in their legal relations by the common law of England, modified by American tradition, rather than by the civil law of Spain and Mexico. Even the most conservative of the new settlers, in so far as they observed any

[2] 1 California Reports. Preface.

system as controlling, ignored the civil law and treated the common law as their rule of conduct, both as private citizens and as magistrates exercising judicial functions."[3]

According to Mr. E. A. Crosby in his manuscript "Events in California," "The application of the common law in deciding cases was made in direct violation of the old Spanish law. The Spanish civil law was so little known that the proceedings were not conducted under its provisions . . . In fact there was very little law of any kind, very few courts and very little proceedings during the first year of emigration to California."[4]

Predisposition of the majority of the people toward common law ideas and legal institutions was noted in many official expressions.

In the very interesting report of the Judiciary Committee of the Senate in the Legislature of 1850, recommending the adoption of the common law, as the basis of our jurisprudence, it was said that the civil law of Spain and Mexico was not then in force.[5] The report, found in the first volume of the California Reports, in commenting upon the chaotic conditions of affairs in California and the system which the Americans were able to produce, says: "They (Americans) have taken the common law, the only system with which they were acquainted, as their guide. Their bargains have been made in pursuance of it, their contracts, deeds and wills have been drawn and executed with the usual formalities, the courts have taken its rules to govern their adjudication, their marriages have been solemnized under it—and, after death their property has been distributed as it prescribes."

" . . . The first settlers of the United States brought with them from the mother country the common law and established it in an uninhabited region. The emigrants to California brought with them the same system, and have established it in a country almost equally unoccupied. If a change, therefore, is made, it must be a substitution of the civil law in place of the common law. If you sanction the latter by legislative enactment, you only give your authority to what had already been done in anticipation of such authority."[6]

A noteworthy instance of official recognizance of the existence of the common law is found in the case of Fowler v. Smith. In that case Justice Murray held that a conveyance made in January 1850, three months before the formal adoption by the legislature of the common law, made by one American to another, was to be governed by the common law and not by the civil law. He also held that the Mexican statute of usury had ceased to be of any effect, although the formal act of abolition was not passed until the twenty-second of April, 1850.

The clause of the Constitution of 1849 guaranteeing the separate property of the wife brought on lively debates between the champions of the civil law and the advocates of the common law. Governor Burnett in his message to the first Legislature (1849-1850) strongly recommended the adoption of the Civil Code and the Code of Practice of Louisiana, suggesting that the common law

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[3] O. K. McMurray, Community Property System.
[4] Crosby, E. A. "Events in California," Bancroft Collection, University of California.
[5] Journal, Legislature of California, 1850, pp. 459-88.
[6] Report. 1, California Reports.

control the matters of crimes, evidence and commercial law, he being of the opinion that the Louisiana Codes were peculiarly adapted to conditions of California.

Members of the San Francisco bar became so agitated at the Governor's recommendation that they petitioned the Assembly to adopt the common law as modified by the American states. A small group of attorneys led by John W. Dwinelle filed a petition with the Senate urging the adoption of the civil law.

This last petition and the recommendation made by Governor Burnett were referred to a Judiciary Committee composed of Messrs. Crosby, Bennett and Vermule. The result of this was the Report of Judiciary Committee filed on the 27th of February, 1850, which I have previously referred to. Judge Bennett who aided in the preparation of this report was the editor of the first volume of the California Reports.

The common law of England was adopted as the law of California by the enactment of a statute passed on the 13th of April, 1850,[7] which reads as follows:

"The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the constitution or the laws of the state of California, shall be the rule of decisions in all the courts of this state." In the report on the "Civil and Common Law," the common law is defined as the "English Common Law, as received and modified in the United States; in other words, by the American law."

The Act of April 22, 1850[8] abolished all laws in force except such as had been passed by the legislature at the session in the following words: "people do enact as follows: 'That all laws now in force in this state, except such as have been passed or adopted by the legislature, are hereby repealed, provided, however, that no rights accrued, contracts made or suits shall be affected thereby, and providing that the law relating to "Jueces del Campo" or Judges of the Plains shall be excepted, until provision is made for that office by law; and provided, also that such repeal shall not affect any constitutional laws or acts of Congress, or any of the stipulations contained in the Treaty of Peace between the United States and Mexico, ratified at Queretaro, the 30th day of May, 1848."

These two acts passed by the first legislature placed California very definitely among the common law states, the first act by the adoption of the common law, the second act by the repeal of any other laws that might have been in force. There has been some popular confusion on this point, many persons being under the impression that the common law was adopted when the codes went into effect, and that California was primarily a civil law state. It is true that there are a few doctrines in the law of California based on the civil law. These doctrines, however, have been adopted by some positive legislative enactment or by the codes. Such exceptions to the common law as exist in California have been placed there by enactment subsequent to 1850.

The rules and customs of miners which have had a far reaching influence were given legislative sanction by the adoption of the Practice Act in 1851. Sec-

[7] Statutes of California, 1850, Ch. 95.
[8] Statutes of California, 1850, ch. 125.

tion 621 of this act reads as follows: "In actions respecting 'Mining Claims' proof shall be admitted of customs, usages or regulations established and in force at the bar, or diggings, embracing such claims; and such customs, usages or regulations, when not in conflict with the Constitution, and Laws of this state, shall govern the decision of the action." [9]

"The American Law with respect to the discovery, location and development of mining claims owes its character and form to these customs; the law with regard to the appropriation and use of water in the arid and semi-arid states, west of the Mississippi valley, has been evolved from them. The miner's needs required that water be taken from the streams and carried in flumes, often a considerable distance, to enable him to work placer claims. The rules of the older states and of England, whereby the use of running water was limited to him whose land was bounded by the stream, was unsuitable to economic needs and yielded to the greater force. The evolution of vague and indefinite custom into positive law finds no better illustration in modern times than in the process by which the unwritten usages of California gold miners became a most important part of the law of mines and waters." [10]

Another important departure from the common law in California was the adoption of the community property system based upon the Spanish law.

The pioneers that settled California found an established system of marital rights. Either due to lack of selfishness or want of desire to change the property rights of the few women then residing in California, the Spanish law remained a permanent part of the legal system of California.[11]

The provision in the Constitution of California of 1849 defining the wife's separate property was taken from the Constitution of Texas of 1845 which embodies the first constitutional guaranty of a wife's separate property.

The abolishment of the distinction between forms of proceedings in actions at law and suits in equity was made by the adoption of the Civil Practice Act of California in 1850. This reform being adopted practically at the same time as the formation of the state government, the distinctions between procedure in law and equity have been practically unknown to California law.

The "First Report of the Commissioners on Practice and Pleading. Code of Civil Procedure, Albany, Charles von Benthysen, Public Printer, 1848" forms the base of the Practice Act of California of 1850 as drafted by Mr. E. O. Crosby. Although the draft code of 1850 was not adopted in New York, it had a marked influence on California law. The report of 1848 just referred to contained the important provisions abolishing the distinction between law and equity, so far as concerns the form of procedure, the provisions in regard to parties, and those as to simple manner of pleading.

The California Practice Act of 1850 was repealed by the Act of 1851 which was drafted by Stephen J. Field, based chiefly on the New York Draft Code of Civil Procedure of 1850. The Act of 1851 contained as did the Act of 1850 the fundamental principles of the California system of code pleading.

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[9] California statutes, 1851, p. 149.
[10] McMurray, O. K., "Legal and Political Development of the Pacific Coast States."
[11] McMurray, O. K. "The Community Property System."

Mention has already been made of Governor Burnett's recommendation of the adoption of the Civil Code of Louisiana and the Code of Procedure of Louisiana.

In 1860, there was introduced into the Assembly of the State of California a bill to "provide for the preparation of a Code of Laws" by the Hon. P. C. Johnson of Amador County. This bill, however, failed to pass.

Governor Leland Stanford in his message to the Legislature of California in 1863 urged the codification of the laws of California. He stated therein:

"All who have occasion to examine into the statutes of California cannot but be deeply impressed with the state of wild confusion into which they have fallen. Such is their condition that no person, not versed in law, can with any certainty of correctness, turn to the page of our statute book to ascertain what the law is. For all practical purposes, so far as knowledge of them is intended, the example of the Roman tyrant might be followed, who complied with the letter of the law requiring the publication of the ordinances of the empire, by posting them upon a column high above the range of ordinary vision, thereby accomplishing the double object of complying with the law and keeping the people in ignorance of those rules by which they were to be governed. The Bar and Bench find it alike difficult to extract order out of this wild scene of statutory confusion and chaos.

"The necessity of a thorough codification of our laws has been apparent to the legal profession, and has been frequently urged upon the attention of the legislature.

"All the States in the Union which have been thirteen years in existence have attended to this important duty, with the exception of California, and I would recommend that we follow so wise and just an example.

"A commission of three men, learned in the law, should be appointed for the performance of this much needed work."

Again, in the next session, Governor Stanford in his message to the legislature urged a thorough revision and codification of the laws of California, remarking that the citizens of California "not versed by constant familiarity with their contents, and desirous of investigating the laws stand aghast as they survey fourteen ponderous tomes that constitute the statutes of this youthful state, and young aspirants to professional fame tremble as they cross the threshold that leads into this intricate abyss.

"An act authorizing the appointment of a Commission to attend to this important duty would be hailed with satisfaction by the professional students of California law, and by all others who may have occasion to investigate the statutes."

Governor H. H. Haight in his message to the Legislature in 1867 likewise urged a revision, remarking,

"The general statutes of the State are in great need of revision, and a commission for this purpose would not involve burdensome expenditure, and would, if properly constituted, be of great service to the State. Such a commission, however, to be useful should be composed of able lawyers, selected without reference to political opinion, to any consideration except their fitness for this responsible duty."

On March 28, 1868, an "Act to Provide for the revision and compilation of the laws of the State of California and the publication thereof" was passed. Named in the statute as the first commission were J. B. Harmon, John Currey and Henry P. Barber. The duty of the commission as fixed by the statute was to "revise and compile all the laws of the state now in force or which may be passed at the 17th session of the Legislature." Section 3 of the act provided that the "Commissioners shall omit from the system by them to be prepared all laws or parts of laws which in their judgment may be dispensed with without prejudice to the interest of the state or of the people thereof, and shall supply such additional provisions as may be required for the public welfare." Section 4 was to the effect that "All laws of a general character shall be arranged in one compact body—the Revenue Laws to form one concise and comprehensive chapter. The Local and special laws which it may be found necessary to retain shall be arranged in a separate part of the work, the entire work to be as brief as possible consistent with the proper protection of the right and well being of the people."

The act called for a completion of the revision by the first of July, 1869.

This commission adopted as the best and most convenient mode, the alphabetical order of arrangement of subject. In 1870 they reported progress and gave a list of laws which in their judgment should be repealed, among which was that providing for a grand jury system. They also submitted the alphabetical list of the laws that had been revised and were ready for the printer.

The recommendation to abolish the grand jury system is interesting in the light of the statement contained in Colton's "Three Years in California."

The Reverend Walter Colton was the first newspaper editor in California and the first American alcalde at Monterey. Though trial by jury was not recognized by the native law, he called a jury in serious criminal cases. The account of his first jury trial is of interest in view of the recommendation made by the first Code commission of California.

Friday, Sept. 4 (1846)

"I empannelled today the first jury ever summoned in California. The plaintiff and defendant are the principal citizens of the country. The case was one involving property on the one side, and integrity of character on the other. Its merits had been pretty widely discussed, and had called forth an unusual interest. One-third of the jury were Mexicans, one-third Californians, and the other third Americans. This mixture may have the better answered the ends of justice, but I was apprehensive at one time it would embarass the proceedings for the plaintiff spoke in English, the defendant in French, the jury, save the Americans, Spanish, and the witnesses all the languages known to California. But through the silent attention, which prevailed, the tact of Mr. Hartnell, who acted as interpreter, and the absence of young lawyers, we got along very well. The examination of the witnesses lasted five or six hours; I then gave the case to the jury, stating the questions of fact upon which they were to render their verdict. They retired for an hour, and then returned, when the foreman handed in their verdict, which was clear and explicit, though the case itself was rather complicated. To this verdict, both parties bowed without a word of dissent. The

inhabitants who witnessed the trial, said it was what they liked, that there could be no bribery in it, that the opinion of twelve honest men should set the case forever at rest. And so it did, though neither triumphed in the issues. One recovered his property, which had been taken from him by mistake, the other his character which had been slandered by design. If there is anything on earth besides religion for which I would die, it is the right of trial by jury."

The Legislature of 1870 did not continue the life of the original commission, but created a new one empowered to use or discard what had already been done. It was provided that the new commission be appointed by the Governor. Meeting place and length of session were fixed by the statute.[13] November 1, 1871 was the time fixed for the completion of the work.

The commissioners appointed were Charles Lindley, John C. Burch and Creed Haymond.

In 1871 Governor H. H. Haight in commenting upon the work of the Code Commission remarked:

"The laws arranged by them are divided into four codes: a Penal Code, a Code of Civil Procedure (both finished), a Civil Code (also finished), and a Political Code will be ready probably in January.

"That the Commissioners have expended much labor and care upon the work is evident, and such portions of it as I have been able to examine have impressed me very favorably.

"The Penal Code and the Code of Civil Procedure embody in the main the various provisions of law already in force upon these subjects, systematically arranged, with such amendments as are obviously desirable.

"Most of the changes made in the Civil Code are drawn from the Civil Code of New York, a work which bears the impress of thought and labor, and if adopted, will be an important advance in legislation. The provisions taken from the New York Code have been subjected to careful scrutiny.

"Considering that no greater political blessing can be conferred upon the people than simplicity and clearness in their code of laws, and the adaptation especially of the latter to the wants of this commercial age and to the changes which the progress of political science has rendered inevitable, considering the importance of uniformity in laws of a general nature, and of putting an end to the flood of unnecessary local and special legislation, which encumbers the statute books, and seems to have no object, except to swell the volume in bulk, and occupy the time of the Governor and Legislature during the session; and having in view the difficulty of securing a satisfactory revision, the unavoidable expense attending it, and the improbability of a committee of the two Houses being able to devote as much time as they would desire to a thorough examination of the Codes, it was deemed best by my successor in office and myself to request two members of the bar of known qualifications and professional experience to make an examination of the work of the Commission, so as to facilitate the labors of any Joint Committee which might be appointed by the Senate and Assembly. I trust this step will be sanctioned by the Legislature, and that proper compensation will be made to these gentlemen for their time and labor. It was a duty

[13] California Statutes, 1869-70, Ch. DXVI, p. 774.

not sought or desired by them, but simply accepted in compliance with a request made."

Governor Newton Booth in his inaugural address of Friday, December 8, 1871, in commenting upon the work of the Code Commissioners says "the object has not been to change the laws, but to crystalize them in expression and do away with redundancies and with the incongruity of a written Constitution and vast body of unwritten law; to generalize the statutes and principles of common law into a science. Without assuming an ability to pass upon the merits of the report as a whole, I may express the opinion, from a partial examination, that the plan is comprehensive, the arrangement systematic, and the style clear and terse. Believing it important that a work requiring so much care in details should be subject to closer criticism than the members of the Senate and Assembly would be able to give it consistently with their other duties, and desiring that it should be presented to the Legislature in as perfect a form as possible, I have united with Governor Haight in a request to two eminent members of the bar to examine it."

The legislature on the 10th of January, 1872, approved the appointment made by Governor Haight and Governor Booth at the request of the Revision Commission of Charles A. Tuttle, and Sidney L. Johnson as an Advisory Committee to act with, review and report upon the work of such commission.

The first report of the Joint Committee to examine the Codes prepared by the Revision Committee in its review of the Penal Code says "this act does not provide for the adoption of any new system of law, but simply reenacts the existing law, with some few modifications, amendments, and additions . . .

"Your committee believe that the system of law as embodied in the Penal Code prepared by the Revision Commission is more perfect than that prepared by any other State, and it would be well for the honor of California, if, by the action of the present Legislature, it should adopt this great work, thus setting an example which will be speedily followed by all her sister States, adding new laurels to the fame which she has already so justly acquired, and at once becoming, as has been remarked, not only a lawgiver to the thousands within her borders, but the millions who are to succeed them, and by the force of her example to not only the vast population of the whole Pacific Coast, but to the millions of citizens of other States, who will soon follow in her footsteps."

This committee was composed of C. G. W. French, and F. E. Spencer, from the Assembly, and W. W. Pendegast, A. Comte, James Van Ness and James T. Farley from the Senate.

The Political Code was referred to a select committee, composed of Senators William Irwin, George Oulton, Miles P. O'Connor, George C. Perkins and S. C. Hutchings, and Assemblymen William R. Wheaton, John K. Luttell, John A. Eagan, E. B. Mott, Jr., and W. N. De Haven.

In their report they state that they have "given to the Code a careful examination, reading it line by line, and comparing it with the statutes of this state, and when necessary with the laws of other states." In conclusion the committee says of the Code that it "has been prepared with great care; is a work worthy of our state; that its adoption will confer a lasting benefit upon the people. We report the bill to the Legislature with our unqualified approval, and earnestly recommend its passage."

In order to avoid the difficulty of passage of the Codes due to prejudice of the legislature, a Commission to Examine the Codes was appointed by the Governor. This committee consisted of the Hon. Stephen J. Field, a justice of the Supreme Court of the United States; Hon. Jackson Temple, an ex-Justice of the Supreme Court of California, and the Hon. John W. Dwinelle of the San Francisco Bar. The Commission spent several months in examining the Codes. Their report dated October 11th, 1873 states:

"We found the four Codes—the Political Code, the Penal Code, the Civil Code, and the Code of Civil Procedure—as prepared by the Commissioners and enacted by the Legislature, perfect in their analysis, admirable in their order and arrangement, and furnishing a complete code of laws, the first time, we believe, that such a result has been achieved by any portion of the Anglo-Saxon or British races. It seems inexplicable that those people, who boast of being the most fully imbued with the sentiment of the law, have left their laws in the most confused condition, resting partly in tradition, but for the greater part scattered through thousands of volumes of books of statutes and reports, and thus practically inaccessible to the mass of the people. That California has been the first of this class to enact a complete code of municipal law will add not only to the prosperity of her people, but redound to her honor as a State. If the work of the Commissioners needed revision, it was mostly owing to obstacles which neither their ability nor industry could overcome.

"We found that the Codes needed revision more for the purpose of harmonizing their respective provisions, than for any other. This want of complete harmony was a result inevitable to the short period of time which the Commission had for the preparation of their work. At the same time it was found that many definitions taken from the proposed Codes of New York which had never been enacted there, did not stand the test of examination; and that many legislative provisions would change our settled law of twenty-two years standing, and not for the better. We have proposed to change many of these provisions so as to bring them into harmony with the law as heretofore existing and construed by our Courts for nearly a quarter of a century. At the same time, our attention has been called to defects, which, within the last one or two years, have for the first time made themselves apparent in laws which have stood on our statute books for many years, and which we have endeavored to correct, making as little change as possible in the general frame of the statute."

"Usually codification has had for its purpose the unification of discordant elements in the law of a particular country; in France, in Napoleonic times, the reconciliation of the Roman Law obtaining in the south with the customary law in the north; in the Germany of Frederick II, the assimilation of the customs and laws of the various parts of a greater Prussia; and in our own day, the commercial codes framed by the Commissioners on Uniform Laws have for their object the substitution of uniform rules for the varying laws of the several states. But our code was born of no such impulse. The primary object of its chief author and advocate, David Dudley Field, was to restate in systematic and accessible form the common law as it has been modified to suit American conditions, to settle questions upon which disputes had arisen and to introduce such reforms as might seem necessary to make the legal system harmonious and free from anachronism.

"Field began his agitation for the adoption of a Civil Code in the year 1839, when the nineteenth century legislative reform movement was at its height. The New York Revised Statutes which had remodeled the law of real property were only ten years old. Other American states had followed its example by adopting legislation which abolished common law rules that were considered to be out of harmony with American conditions. Livingston had recently completed his task of drafting and revising the codes of Louisiana. Meanwhile, in England, the same movement for legislative reform was in full swing, and the agitation of Bentham and his followers was bearing fruit. The English law of property was being transformed by the Wills Act and the Fines and Recoveries Act and similar legislation, and the complacent attitude of Blackstone and Eldon was definitely discredited. The French Code had spread over the greater part of Europe and was about to penetrate the new republics of South America. Under such conditions it is not surprising that Field found a receptive attitude toward his suggestion of codification, and was able to secure the insertion in the New York Constitution of 1846 of a provision calling for reduction into a written and systematic code the whole body of the law of the state." [18]

The result of this provision was the first New York Code of Civil Procedure which had been the model for the procedural system now prevalent in most of the American states.

The proposed civil code, however, met with objection. The commission of 1850 appointed by the legislature of New York to draft a code of substantive law reported against such a scheme. A second commission was appointed in 1857 with David Dudley Field as one of the members. The final draft of the code was published in 1865 containing the ninth report of the commission. The legislature of New York did not take any action on the code until 1878, when it adopted the code, which, however, failed to go into effect on account of the Governor's veto. Field, however, continued to urge its adoption. The code was finally rejected in 1887. It was, however, adopted by the legislature of the territory of Dakota in 1865, and later by North Dakota, South Dakota, California, Idaho and Montana.

The Civil Code of California as originally adopted was the Field draft code, with some changes to adapt it to previous California legislation. It was found to contain provisions which conflicted with prior statutes and decisions, so in 1873, it was submitted for revision to the Board of Code Examiners, consisting of Stephen J. Field, Jackson Temple, and John W. Dwinelle. This board submitted a series of amendments which were adopted in 1874.

The interpretation of the Code has been the subject of a series of articles published in volumes 3 and 4 of the West Coast Reporter by Professor Pomeroy. Professor Pomeroy contended that the codes must be treated as merely a supplement to the common law system, altering its rules only to the extent that the intent to do so clearly appeared.

Pomeroy's method of interpretation is not applicable to the provisions of the code with regard to estates and future interests which were taken by Field from the New York Revised Statutes of 1829. The purpose of this revision

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[18] Harrison, M. E. "First Half Century of the California Civil Code."

of the law, as is clearly shown both by the comprehensiveness of its terms and the notes of the revisers was to supersede completely the common law system.

In deciding the question whether or not intent is shown to depart from the common law, the courts have given weight to the annotations of the Code Commissioners of California, which to a large extent are a repetition of the notes of Field himself. These notes refer to adjudged cases.

In interpreting section 1927 of the Civil Code, the court in the case of Baranov v. Scudder[14] says: "the notes of the commissioners who prepared the Civil Code indicate that the section was not intended to be a reenactment of the common law, but that it was borrowed from the civil law." The common law rule was held to be changed.

The whole arrangement of the Civil Code; its division of subject matter into persons, property, and obligation, follows the Code Napoleon. In addition to this and other contributions from the French Civil Code may be mentioned sections 1025-1033 in regard to accessions to personal property, sections 1014-18 on alluvion and section 1277 on the formal requisites of an olographic will.

The French Civil Code has also influenced the Code of Belgium, Holland, Spain, Italy, Portugal and the south and central American countries. Louisiana has been greatly influenced by the French Code, while Quebec has been influenced by pre-revolutionary France.

The Penal Code of California is practically taken from the New York Draft of a Penal Code prepared by the Commissioners of the Code of 1864.

The commissioners were David Dudley Field, William Curtis Noyes, and Alexander W. Bradford. The final report was submitted in 1865. The draft penal code owes much to the Penal Code drafted by Edward Livingston for Louisiana but not adopted by her. The Penal Code of California has served as a model for the Penal Code of Porto Rico. The draft Penal Code of New York was also adopted by Dakota.

The Political Code proposed by the Commissioners for New York was the model for the Political Code of California. The New York Code is found in "The Political Code of the State of New York. Reported complete by the Commissioners of the Code to be submitted to the legislature on the 10th day of April, 1860, pursuant to chapter 266 of the Statutes of 1857. Albany, October 10th, 1859. Albany: Weed, Parsons & Co., 1860." This code has, however, not been adopted in New York.

Since the adoption of the Codes in 1872 several commissions have been appointed to examine and revise the codes.

The first one was appointed in 1873 and was known as the Commission to Examine the Codes, which has already been referred to. It submitted a report and several amendments which were enacted in 1874. A reprint of its report was published in 1916.

In 1896 a commission for the Revision and Reform of the Law was published. The commission consisted of Ryland B. Wallace, J. C. Dalt, and the Hon. Frank T. Baldwin. Its work consisted principally in harmonizing conflicting sections of the Codes.

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[14] (1918) 177 Cal. 458, 170 Pac. 1122.

In 1899 a Commission for the Revision and Reform of the law was appointed consisting of A. C. Freeman, W. C. Van Fleet and George J. Dennis. The Code of Civil Procedure received a great deal of attention as it contained many sections reiterating or tending to reiterate, provisions in the state constitution and so many superfluous sections. The Commission recommended the repeal of these sections. Existing statutes were compiled for the purpose of incorporating them into the code. A list of amendments also was submitted. These were adopted in 1901. A supplemental report was issued in 1901.

The validity of the amendments to the Codes adopted in 1901 was soon assailed in the Supreme Court of California in the case of Lewis v. Dunne.[18] The Court there held that the amendments were not constitutionally enacted, on the grounds that each of the codes constituted more than one subject and that neither could now be validly enacted because of the provisions of our constitution requiring each act to embrace but one subject, which must be expressed in its title, and that neither can be amended in a single act if the amendments involve two or more of these subjects, and also, that no complete revision of either code can be made without publishing at length the sections not affected by the revision, as well as those revised or amended.

In 1902 the Commission for the Revision and Reform of the Law issued an Index to the laws from 1895 to 1903.

In 1907 an Index of laws from 1850 to 1907 was issued by the Commission for the Revision and Reform of the Law.

In 1909 a report was issued by that office listing the General laws codified, the General laws repealed, code sections amended and new sections added.

For a proper understanding of the California Codes one should have:

(1871-2) The proposed Codes of California with annotations to the New York Codes and to California citations. These are known as the Revised Laws of California.

(1872) The Codes as passed. The official state edition. This is the only edition that was ever published by the state.

(1872) The annotated edition published by the Code Commissioners. This edition has in many cases more annotations than the "Revised Laws" but it does not contain references to the New York Codes.

(1874) Annotated Civil Code. Same as above, but includes amendments for 1873-1874.

(1865) The draft of the Civil Code of New York, and also drafts of the other codes.

Deering's Pocket edition which refers to the New York Codes and often to the Code Commissioners' notes.

Kerr's Annotated Codes which give cases interpreting sections but do not contain notes of the Code Commissioners.

Other codes of interest are:

Hittell's Codes of 1876 (2 v.) plus the supplement of 1880.

Deering's Codes and Statutes 1885-6, which contain Code Commissioner's Notes and Code Examiners Notes.

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[18] (1901) 134 Cal. 291.

Pomeroy's Codes published in 1901. These were declared void.

Farrall's Code of Civil Procedure cites notes of California Code Commissioners which frequently though not always includes explanatory matters from the Field Code.

Notes of the Revision of New York Property Law found in Fowler's Real Property Law of the State of New York.

For interesting reports see the various Committee's reports, which may be found in the Legislative Journals, generally in the Appendix, especially the Report of the Code Commissioners of 1874. Also the reports of the Committee for the Revision and the Reform of the Law.

Among the articles may be mentioned:

M. E. Harrison. The first Half Century of the California Civil Code.

O. K. McMurray. Legislative and Political Development of the Pacific Coast States.

O. K. McMurray. The Beginnings of the Community Property System in California and the Adoption of the Common Law.

Charles S. Cushing. The Acquisition of California, Its influence and development under American Rule.

Joseph Lewinson, Law Reform in California.

[Bibliography will appear in the April issue of Law Library Journal.]

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Revised to January 1, 1929

Publication	Dates of regular sessions	Source	Latest vol. to appear
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Reports	. . .	West Pub. Co., St. Paul, Minn.	217
App. Reports	. . .	West Pub. Co., St. Paul, Minn.	21
Session laws	Quadrennial 1923, 1927 etc.	Secretary of State	Special session 1926 & Reg. 1927
Alaska			
Reports	. . .	West Pub. Co., St. Paul, Minn.	7
Session laws	Odd years	Secretary of Territory	1927
Arizona			
Reports	. . .	Bancroft, Whitney & Co., San Francisco	30
Session laws	Odd years	State Librarian	1927 Reg. & 1st to 4th Spec.
Arkansas			
Reports	. . .	Secretary of State	176
Session laws	Odd years	Secretary of State	1927
California			
Reports	. . .	Bancroft, Whitney & Co., San Francisco	202
App. Rep.	. . .	Bancroft, Whitney & Co., San Francisco	82
Adv. parts for both sets	. . .	Bancroft, Whitney & Co., San Francisco	Extra 1926 & Reg. 1927
Session laws	Odd years	Secretary of State	
Colorado			
Reports	. . .	Callaghan & Co., Chicago	83
Session laws	Odd years	Secretary of State	1927
Connecticut			
Reports	. . .	Banks L. P. Co., N. Y. City	107
*Advance parts	. . .	Banks L. P Co., N. Y. City.	
Session laws	Odd years	State Librarian	1927
Delaware			
Reports	. . .	State Librarian	32
Chancery Reports	. . .	State Librarian	14
Session laws	Odd years	Secretary of State	1927
District of Columbia			
Appeals	. . .	West Pub. Co., St. Paul, Minn.	57
Acts affecting District of Columbia	. . .	John Byrne Co.	1927-28
	. . .		
Florida			
Reports	. . .	Attorney General	94
Session laws	Odd years	Secretary of State	1927
Georgia			
Reports	. . .	Harrison Co.	166
App. Rep.	. . .	Harrison Co.	37
Session laws	Annual	State Librarian	1927
Hawaii			
Reports	. . .	Clerk Supreme Ct.	29
*Advance parts	. . .	Clerk Supreme Ct.	
Session laws	Odd years	Secretary of Territory	1927
Idaho			
Reports	. . .	Bancroft, Whitney & Co., San Francisco	45
Session laws	Odd years	Secretary of State	1927
Illinois			
Reports	. . .	Callaghan & Co., Chicago	331
*Advance parts	. . .	Supreme Ct. Reporter	
App. Rep.	. . .	Callaghan & Co., Chicago	248
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Court of Claims Reports	. . .	T. H. Flood & Co., Chicago	5
Session laws	Odd years	Secretary of State	1927 & 1928 1st to 3rd Spec.
Indiana			
Reports	. . .	Secretary of State	198
App. Reports	. . .	Secretary of State	86
Session laws	Odd years	Secretary of State	1927

*Advance parts paged to correspond with permanent edition.

Publication	Dates of regular sessions	Source	Latest vol. to appear
Iowa			
Reports		Secretary of State	204
Session laws	Odd years	State Printing Co.	1927 & 1928 Spec.
Kansas			
Reports	. . .	State Librarian	125
*Advance parts	. . .	State Librarian	
Session laws	Odd years	Secretary of State	1927 & 1928 Spec
Kentucky			
Reports	. . .	State Librarian	224
*Advance parts	. . .	State Librarian	
Session laws	Even years	State Librarian	1928
Louisiana			
Reports	. . .	State Librarian	165
Courts of Appeal	. . .	Hauser Printing Co.	8
Advance parts			
Session laws	Even years	Secretary of State	1927 Extra & 1928
Maine			
Reports	. . .	State Librarian	126
Session laws	Odd years	State Librarian	1927
Maryland			
Reports	. . .	King Bros., Baltimore	153
*Advance parts	. . .	King Bros., Baltimore	
Session laws	Odd beginning with 1927	State Librarian	1927
Massachusetts			
Reports	. . .	Samuel Usher, Fort Hill Press, Boston	261
Advance parts	. . .		
Session laws	Annual	State Librarian	1928
Michigan			
Reports	. . .	Callaghan & Co., Chicago	241
*Advance parts	. . .	Callaghan & Co., Chicago	
Session laws	Odd years	State Librarian	1927
Minnesota			
Reports	. . .	Lavallee Law Book Co., St. Paul	174
* Advance parts		Lavallee Law Book Co., St Paul.	
Session laws	Odd years	Secretary of State	1927
Mississippi			
Reports	. . .	E. W. Stephens Publ. Co., Columbia, Mo.	149
Session laws	Even years	Secretary of State	1928
Missouri			
Reports	. . .	E. W. Stephens Pub. Co., Columbia, Mo.	317
App. Reports	. . .	E. W. Stephens Pub. Co., Columbia, Mo.	220
Session laws	Odd years	Secretary of State	1927
Montana			
Reports	. . .	Bancroft, Whitney & Co., San Francisco	82
Session laws	Odd years	State Publishing Co.	1927
Nebraska			
Reports	. . .	State Librarian	115
Session laws	Odd years	State Librarian	1927
Nevada			
Reports	. . .	Secretary of State	50
Session laws	Odd years	Secretary of State	Reg. 1927 & Spec. 1928
New Hampshire			
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Session laws	Odd years	Edson C. Eastman, Concord, N. H.	1927
New Jersey			
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Equity Reports	. . .	Soney & Sage, Newark, N. J.	100
Miscellaneous Reports	. . .	Soney & Sage, Newark, N. J.	5
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Publication	Dates of regular sessions	Source	Latest vol. to appear
New Mexico			
Reports	. . .	Central Printing Co., Albuquerque	31
Session laws	Odd years	Secretary of State	1927
New York			
Reports	. . .	J. B. Lyon Co., Albany	248
App. Div. Repts.	. . .	J. B. Lyon Co., Albany	223
N. Y. Miscellaneous	. . .	J. B. Lyon Co., Albany	132
*Advance parts covering all the above	. . .	J. B. Lyon Co., Albany	
N. Y. Supplement and* adv. parts	. . .	West Pub. Co.	230
Session laws	Annual	J. B. Lyon Co., Albany	1928
North Carolina			
Reports	. . .	Secretary of State	195
*Advance parts	. . .	Secretary of State	
Session laws	Odd years	Secretary of State	1927
North Dakota			
Reports	. . .	Secretary of State	56
Session laws	Odd years	Secretary of State	1927
Ohio			
Reports	. . .	Baldwin Law Publishing Co., Cleveland	117
App. Reports	. . .	Baldwin Law Publishing Co., Cleveland	25
Advance parts	. . .	Ohio Law Bulletin and Reporter, Cincinnati	
Session laws	Odd years	Secretary of State	1927
Oklahoma			
Reports	. . .		131/132
Criminal Reports	. . .		30
Session laws	Odd years	Secretary of State	1927
Oregon			
Reports	. . .	Bancroft, Whitney & Co., San Francisco	125
Session laws	Odd years	Secretary of State	1927
Pennsylvania			
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Superior Court Repts.	. . .	Geo. T. Bisel & Co., Philadelphia	93
District and County Reports	. . .	Legal Intelligencer, Philadelphia	10
Advance parts for all the above	. . .	Legal Intelligencer, Philadelphia	
Session laws	Odd years	Secretary of State	1927
Philippines			
Reports	. . .	Bureau Insular Affairs, Washington	49
Public laws	. . .	Bureau Insular Affairs, Washington	22
Porto Rico			
Reports	. . .	Bureau Insular Affairs, Washington	33
Advance parts	. . .	Secretary-Reporter, San Juan	
Session laws	Annual	Bureau Insular Affairs, Washington	1928
Rhode Island			
Reports	. . .	State Librarian	48
Superior Court	. . .	Pub. by Rhode Island Law Record, Providence, R. I.	
Rescript, 1917-18 Decisions			4
Acts and Resolves	Annual	State Librarian	1928
Public laws	. . .		1927/28
South Carolina			
Reports	. . .	R. L. Bryan, Columbia, S. C.	146
*Advance parts	. . .	R. L. Bryan, Columbia, S. C.	
Session laws	Annual	State Library	1928
South Dakota			
Reports	. . .	State Publ. Co, Pierre, S. D.	50
Session laws	Odd years	Secretary of State	Reg. & Spec. 1927
Tennessee			
Reports	. . .	E. W. Stephens Pub. Co., Columbia, Mo.	156
Court of Appeals		E. W. Stephens Pub. Co., Columbia, Mo.	6
Session laws	Odd years	Secretary of State	1927
Texas			
Reports	. . .	Pioneer Pub. Co., Fort Worth, Tex.	116

Publication	Dates of regular sessions	Source	Latest vol. to appear
Criminal Reports	. . .	Pioneer Pub. Co., Fort Worth, Tex.	109
Session laws	Odd years	Secretary of State.....	Reg. 1927 & 1st called 1927
Utah			
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Session laws	Odd years	Arrow Press, Salt Lake City.....	1927
Vermont			
Reports	. . .	State Librarian	100
*Advance parts	. . .	State Librarian	
Session laws	Odd years	State Librarian	Reg. & Spec. 1927
Virginia			
Reports	. . .	Secy. of Commonwealth.....	150
Session laws	Even years	Secy. of Commonwealth.....	1928
Washington			
Reports	. . .	Bancroft, Whitney & Co., San Francisco	148
Advance parts	. . .	Bancroft, Whitney & Co., San Francisco	
Session laws		State Law Librarian.....	1927
West Virginia			
Reports	. . .	Secretary of State.....	104
Session laws	Odd years	Secretary of State.....1927	Reg. & 1st Extra
Wisconsin			
Reports	. . .	Callaghan & Co., Chicago.....	195
Session laws	Odd years	State Supt. of Pub. Prop'ty, Madison	1st & 2d Spec. 1928
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Wyoming			
Reports	. . .	Callaghan & Co., Chicago.....	37
Session laws	Odd years	State Librarian	1927
United States			
Reports	. . .	Govt. Printing Office.....	275
*Advance parts	. . .	Govt. Printing Office	
Advance opinions....	. . .	Clerk of the Supreme Court	
Reports L. Ed.....	. . .	Lawyers Co-op. Pub. Co., Rochester, N. Y.	71
Advance parts	. . .	Lawyers Co-op. Pub. Co., Rochester, N. Y.	
Porto Rico Federal...	. . .	Lawyers Co-op. Pub. Co., Rochester, N. Y.	12
I. C. C.	. . .	Govt. Printing Office, Washtn., D. C.	140
*Advance parts	. . .	Govt. Printing Office.....	
Attorney General Opinions.....		Govt. Printing Office.....	34
*Advance parts	. . .	Govt. Printing Office.....	
Court of Claims		Govt. Printing Office.....	65
Comptroller General Decisions...		Govt. Printing Office.....	7
Customs Appeals		Govt. Printing Office.....	14
Extraterritorial cases		Chinese American Pub. Co., 25 Nanking Road, Shanghai, China..	2
Federal anti-trust decisions		Govt. Printing Office.....	10
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Federal Trade Commission Decisions		Govt. Printing Office	9
*Advance parts	. . .	Govt. Printing Office	
Internal Revenue		Govt. Printing Office	29
Interior Dept. Appealed pension and retirement claims		Govt. Printing Office.....	21
Interior Department, Public Lands.		Govt. Printing Office.....	51
*Advance parts	. . .	Govt. Printing Office.....	
Commissioner of Patents Decisions.		Govt. Printing Office	1927
Tax appeals, Board of. . . .		Supt. of Documents.....	7
*Advance parts.....	. . .	Supt. of Documents.....	
Treasury Decisions		Govt. Printing Office.....	53
*Advance parts	. . .	Govt. Printing Office.....	